

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDRE K. GREEN,
Petitioner

v.

WILLIAM STICKMAN, et. al.,
Respondents

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CIVIL ACTION

NO. 03-674

Memorandum and Order

YOHN, J.

November ____, 2004

Presently before this court is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by state prisoner Andre K. Green (“Petitioner”). Petitioner is currently incarcerated at State Correctional Institution Greene in Waynesburg, Pennsylvania, where he is serving a life sentence for second-degree murder and attempted robbery. For the reasons stated herein, the petition will be accepted as timely and remanded to the magistrate judge for a report and recommendation as to its merits.

I. Background and Procedural History¹

Petitioner was convicted on October 17, 1996 of second-degree murder and attempted robbery following a jury trial in the Court of Common Pleas for Northampton County, Pennsylvania. He was sentenced to a mandatory term of life imprisonment. Following his

¹Facts concerning the procedural history of the case preceding the filing of the habeas petition have been culled from the Magistrate Judge’s Report and Recommendation, Petitioner’s Memorandum of Fact and Law in Support of Petition for a Writ of Habeas Corpus, and Respondents’ Answer and Consolidated Memorandum of Law.

conviction, petitioner appealed to the Superior Court of Pennsylvania, which affirmed his judgment of sentence on October 14, 1997. *Commonwealth v. Green*, 704 A.2d 1117 (Pa. Super. 1997). Petitioner then filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, which was denied on March 12, 1998. *Commonwealth v. Green*, 712 A.2d 285 (Pa. 1998).

On February 26, 1999, petitioner filed a *pro se* petition pursuant to the Pennsylvania Post Conviction Relief Act (“PCRA”), *see* 42 Pa.C.S.A. § 9541 *et seq.* The PCRA court appointed counsel, who filed briefs indicating that she would pursue some, but not all, of petitioner’s claims. She later filed two additional documents, a “no merit brief,” in which she recommended dismissal of two of the three claims raised in the initial petition, and a brief in support of the third claim. A PCRA hearing was held on May 5, 1999. On August 20, 1999, the PCRA court issued an order vacating the appointment of counsel, having determined that appointed counsel’s representation of petitioner was inadequate to ensure a fair review of his claims. The court appointed new counsel, who withdrew in November 1999, citing a conflict of interest. A third lawyer was appointed, and a second PCRA hearing was held on December 23, 1999.

Petitioner’s counsel at the second PCRA hearing sought to introduce three new claims, but respondents, having had no prior notice of the additional claims, objected. Sustaining the objection, the court denied petitioner’s motion to have the new claims considered at the December 23 hearing. On December 30, 1999, the court issued an order denying relief as to the claims argued at the December 23 hearing, but granting petitioner leave to submit an amended petition raising the three new claims.

From that point, petitioner’s counsel pursued the petition on two separate tracks: he filed

an appeal in Superior Court from the December 30 order; and he filed an amended petition in PCRA court raising the three new claims. The Superior Court quashed the appeal from the December 30 order on the ground that the order was not final and appealable because issues remained for the PCRA court to decide. A hearing was held in PCRA court on May 24, 2001 to address the new claims in the amended petition. On June 29, 2001, the amended PCRA petition was denied. A timely appeal was filed in Superior Court, and the order of the PCRA court was subsequently affirmed on March 25, 2002. A petition for allowance of appeal in the Supreme Court of Pennsylvania was denied on August 14, 2002.

Petitioner filed the instant *pro se* habeas corpus petition on January 29, 2003, beyond the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2244(d)(1).² He asserted seven grounds for relief, two relating to his right to a fair trial, four relating to his right to effective assistance of counsel, and one relating to his right to file a habeas corpus petition without governmental obstruction. *See* Memorandum of Fact and Law in Support of Petition for Writ of Habeas Corpus. For the seventh and final ground, he alleged that prison staff had prevented him from filing a timely petition by confiscating his legal papers and failing to return them to him for a period of several months. *Id.* at ¶ 144.

With respect to the claim of governmental obstruction, petitioner alleged that all of the paperwork relating to his case was confiscated by prison officials on September 18, 2002 from the cell of Guy T. Grazier, a “jail-house lawyer” who had prepared petitioner’s *pro se* PCRA

²The magistrate judge’s Report and Recommendation lists the date of filing as February 3, 2003, which was the date the petition was received in the office of the clerk of the court. The petition was delivered to prison officials for mailing on January 29, 2003, and, following the prison mailbox rule, I will accept this date as the date of filing.

petition and who was also preparing his habeas petition. (Memorandum of Fact and Law in Support of Petition for Writ of Habeas Corpus at ¶ 144.) For violating prison rules, Grazier was moved on September 18 to the prison's Restricted Housing Unit ("RHU"). *Id.* Petitioner averred that he was unable, despite repeated requests, to recover his paperwork until December 27, 2002, when his papers were returned to Grazier upon Grazier's release from RHU. *Id.* at ¶ 145, ¶ 154. Petitioner argued that equitable tolling of the AEDPA statute of limitations was justified in his case, and he sought an evidentiary hearing on the timeliness of his petition. *Id.* at ¶ 155.

On April 6, 2003, Petitioner amended his petition to include an additional ground for relief relating to his right to a fair trial.³ (Petitioner's Supplement Petition for Writ of Habeas Corpus and Memorandum of Fact and Law in Support.) Respondents argued that the entire petition should be dismissed as time barred. (Respondents' Answer and Consolidated Memorandum of Law to Petitioner's Petition for a Writ of Habeas Corpus at 15.)

On September 2, 2003, the magistrate judge issued a Report and Recommendation in the case. He concluded that petitioner's claim was time barred under AEDPA, because petitioner had not met the strict standard for proving entitlement to equitable tolling. (Report and Recommendation at 10.) On September 12, 2003, petitioner filed objections to the Report and

³The amendment to the petition was received in the office of the clerk on April 10, but it was filed at the prison on April 6, which I will accept as the filing date pursuant to the prison mailbox rule. The Federal Rules of Civil Procedure apply to motions to amend habeas corpus petitions. *See U.S. v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999). Under Rule 15(c)(2), a district court may, in its discretion, permit an amendment to a petition after the expiration of the statute of limitations to provide factual clarification or amplification, as long as the original petition was timely filed and the petitioner does not seek to add an entirely new claim or new theory of relief. *United States v. Thomas*, 221 F.3d 430, 436 (3d Cir. 2000). I will leave it to the magistrate judge to consider on remand whether petitioner's April 6 amendment relates back to the date of his original filing pursuant to Rule 15(c)(2) or whether it is an entirely new, and therefore time-barred, claim.

Recommendation, arguing that the magistrate judge underestimated his diligence in trying to retrieve his legal papers, and that he should be granted equitable tolling for the period during which his papers were in the custody of prison staff. (Petitioner's Objections to the Report and Recommendation ("Petitioner's Objections") at 3-4) He again requested an evidentiary hearing to address the timeliness of his petition and offer proof of governmental obstruction. (Petitioner's Objections at 4.) Respondents filed an answer to petitioner's objections, asserting that they had been unable, through reasonable investigation, to uncover information sufficient to establish the truth of petitioner's factual claims concerning his diligence in attempting to recover his papers. (Respondents' Answer to Petitioner's Objections to the Report and Recommendation at 3-5.)

Counsel was appointed for petitioner, and an evidentiary hearing was held on June 25, 2004 to give petitioner an opportunity to offer evidence in support of his equitable tolling claim. At the hearing, the court heard testimony from petitioner, Grazier, and Captain Burns, a supervisory security officer employed by the prison. At the close of the hearing, the parties were ordered to submit memoranda addressing the issue of equitable tolling in petitioner's case. Petitioner and respondents submitted memoranda on July 23, 2004 and August 5, 2004, respectively.

II. Discussion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a one-year statute of limitations on applications for a writ of habeas corpus. 28 U.S.C. § 2244(d)(1). The statute of limitations begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* at § 2244(d)(1)(A). AEDPA's statute of limitations is subject to two tolling exceptions: (1) statutory

tolling, during the time a “properly filed” application for state post-conviction review is pending in state court, and (2) equitable tolling, a judicially crafted exception. *Merritt v. Blaine*, 326 F.3d 157, 161 (3d Cir. 2003) (citing *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999)). Both statutory and equitable tolling are implicated in this case.

A. Statutory Tolling

There is no dispute that the statute of limitations on petitioner’s federal habeas claim was tolled pursuant to 28 U.S.C. § 2244(d)(2) until November 26, 2002.⁴ Petitioner’s state court judgment became final on June 10, 1998, at the expiration of the ninety-day period for seeking discretionary review in the United States Supreme Court. *See Kapral v. U.S.*, 166 F.3d 565, 575 (3d Cir. 1999) (holding that “a state court judgment is ‘final’ (for purposes of collateral attack) at the conclusion of review in the United States Supreme Court or when the time for seeking certiorari review expires”). The AEDPA statute of limitations therefore began to run on June 10, 1998. Petitioner stopped the clock when he filed his first PCRA petition in state court on February 26, 1999—261 days into the statute of limitations period. Thereafter, petitioner had properly filed claims for post-conviction relief pending in state court until August 14, 2002, the date on which the Supreme Court of Pennsylvania rejected his bid to appeal the Superior Court’s denial of PCRA relief. *See Stokes v. Dist. Att’y of Phila. County*, 247 F.3d 539, 542 (3d Cir. 2001) (holding that a claim for post-conviction relief is no longer considered “pending” during the ninety-day period when a state prisoner may file for certiorari review in the United States

⁴28 U.S.C. § 2244(d)(2) provides that “[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.”

Supreme Court). On August 14, 2002, with 104 days remaining, the statute of limitations began to run again. It expired on November 26, 2002.

B. Equitable Tolling

Absent equitable tolling, petitioner's habeas petition, which was not filed until January 29, 2003, was 64 days late and therefore time barred under AEDPA. The one-year filing deadline in 28 U.S.C. § 2244(d)(1) can be subject to equitable tolling, but "only when the principle of equity would make the rigid application of a limitation period unfair. Generally, this will occur when the petitioner has in some extraordinary way been prevented from asserting his or her rights. The petitioner must show that he or she exercised reasonable diligence in investigating and bringing the claims." *Miller v. New Jersey Dept. of Corr.*, 145 F.3d 616, 618-619 (3d Cir. 1998) (internal citations and alterations omitted). The burden is on the petitioner to prove all facts, both procedural and substantive, entitling him to relief. *Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982).

Petitioner and respondents in this case agree that the confiscation of a petitioner's papers by correctional officers shortly before the filing deadline is an extraordinary circumstance that would, if the petitioner exercised reasonable diligence, warrant equitable tolling. *See Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (declaring that the "intentional confiscation of a prisoner's habeas corpus petition and related legal papers by a corrections officer is 'extraordinary' as a matter of law"). The Third Circuit addressed this issue directly in *Robinson v. Johnson*, 313 F.3d 128 (3d Cir. 2002). In *Robinson*, the court considered several factors relevant to the equitable tolling analysis, including (1) how long the petitioner was deprived of his papers; (2) whether the petitioner was in the process of drafting the petition before the papers

were confiscated; (3) whether the petitioner relied on the papers in preparing his petition; and (4) whether the petitioner sought to file a timely petition in spite of the deprivation and then clarify it once the materials were recovered. *Robinson*, 313 F.3d at 142-143. On the facts of the case in *Robinson*, the court concluded that the petitioner had failed to carry his burden with respect to the equitable tolling issue. *Id.* at 143.

This case, however, is distinguishable from *Robinson* in almost all of its pertinent facts. In *Robinson*, the petitioner made no claim that he had been working on his petition before his papers were removed. *Id.* In this case, both petitioner and Grazier testified that the petition was not only in progress but substantially complete by September 18, 2002, which was more than two months before the filing deadline. (Transcript of June 25, 2004 Evidentiary Hearing (“Transcript”) at 14, 47-48). In *Robinson*, the petitioner waited until two months after the limitations period had expired to file his formal grievance. *Robinson*, 313 F.3d at 143. Petitioner in this case testified credibly that he submitted two written requests before the deadline to get his papers back. (Transcript at 23.) These were in addition, he testified, to three prior verbal requests to prison staff. (Transcript at 23.) Petitioner offered credible evidence in support of this testimony.⁵ Moreover, in *Robinson*, the petitioner filed his petition without benefit of the

⁵Petitioner offered into evidence the carbon copy of a completed Inmate Request to Staff form dated November 12, 2002. *See* Plaintiff’s Exhibit 1. He testified that he submitted the original in accordance with standard prison procedures. (Transcript at 34-35.) The form read: “This would be my second request to you about getting my legal work back...I have a deadline to file my appeal. I do need my records and legal papers...I spoke to Officer Mega sometime ago and he told me that he would look into this for me. So, now I am respectfully...asking to get my paperwork...so I do not go over my time limit...”. (Transcript at 21-22.) Petitioner testified that Officer Mega, who was later fired for gross misconduct in an unrelated incident, brought the completed original of the form to petitioner’s cell and threatened him with reprisal if he were to file another. (Transcript at 22.) Although Capt. Burns, a security officer at the prison, testified credibly that there was no record in petitioner’s file of the November 11, 2002 request or any

confiscated papers. *Id.* Petitioner here ultimately relied on the recovered papers in completing his petition, giving rise to an inference not supported in *Robinson* that the papers were, in fact, essential to the timely completion and filing of the petition.

The only substantial factual similarity between the instant case and *Robinson* is that this petitioner, like Robinson, did not file a placeholder petition that he could later have sought to amend. Petitioner testified, however, that he could not have completed even a bare-bones petition without the confiscated papers, which included all of the documents in his possession relating to the case: state court trial transcripts, notes of testimony, briefs, court opinions, and a substantially completed draft of the petition itself. (Transcript at 12, 23). In *Robinson*, the court counted the filing of a bare-bones among the actions an inmate may take to demonstrate his diligence in an equitable tolling situation. *Robinson*, 313 F.3d at 143. The filing of a bare-bones petition was not, however, presented in the case as a *sine qua non* of diligence; it was merely one of several probative factors the court considered.

The *Robinson* factors provide guidance for evaluating a habeas petitioner's diligence in attempting to file a timely petition. Absent due diligence on the petitioner's part, the existence of an extraordinary circumstance alone will not justify the exceptional remedy of equitable tolling. *Schlueter v. Varner*, 2004 U.S.App. LEXIS 19248 (3d Cir. September 14, 2004) at *21. In

other request, he also testified that it would be "fair to say" that properly submitted requests "get lost in the shuffle" and never make it to the files. (Transcript at 88.) Capt. Burns testified that a November 13, 2002 written request from another inmate, whose files were confiscated along with petitioner's, was also inexplicably missing from the security office files. *See* Plaintiff's Exhibit 8 (Transcript at 91-93.) Respondents did not call Mega as a witness to explain what, if anything, he did pursuant to petitioner's verbal and written requests. Nor did respondents offer any explanation as to why the papers were not returned to petitioner when Grazier was transferred to the RHU.

contrast with the late petitioner in *Robinson*, the petitioner in this case has carried his burden of proving not only that extraordinary circumstances prevented him from filing on time, but that he exercised reasonable diligence in trying to overcome those circumstances. Equitable tolling is therefore justified in this case for the period from September 18, 2002, when petitioner's papers were confiscated, until December 27, 2002, when they were returned to his custody. With the benefit of equitable tolling, his habeas petition is timely.⁶

⁶The equitably tolled deadline was March 6, 2003.

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CIVIL ACTION

NO. 03-674

Order

YOHN, J.

AND NOW on this _____ day of November 2004, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport, petitioner's objections thereto, the government's response to petitioner's objections, and an evidentiary hearing, and for the reasons set forth in the foregoing memorandum, it is hereby ORDERED that:

(1) The statute of limitations is equitably tolled for the period from September 18, 2002 until December 27, 2002.

(2) The petition is ACCEPTED as timely.

(3) The petition is REMANDED to the magistrate judge for consideration of the merits of the claims raised therein.

William H. Yohn, Jr., Judge